Lenawee Stamping Corporation d/b/a Kirchhoff Van-Rob[1] *and* Local 3000, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO. Cases 07–CA–168498 and 07–CA–172535

June 14, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

On December 22, 2016, Administrative Law Judge Mark Carissimi issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board orders that Respondent, Lenawee Stamping Corporation d/b/a Kirchhoff Van-Rob, Tecumseh, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to continue in effect the terms and conditions of its 2013–2018 collective-bargaining agreement with Local 3000, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO (the Union) by granting wage increases to skilled and semiskilled unit employees without the Union's consent.

(b) Unilaterally changing terms and conditions of employment of its unit employees by granting referral and sign-on bonuses to unit employees without giving notice and an opportunity to bargain to the Union.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request of the Union, rescind the wage increases given to skilled unit employees on November 30, 2015, and to semiskilled unit employees on March 22 and April 24, 2016.

(b) Continue in effect all the terms and conditions of employment contained in its 2013–2018 collective-bargaining agreement with the Union.

(c) Upon request of the Union, rescind the referral and sign-on bonuses granted to unit employees beginning on March 22, 2016.

(d) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All regular full-time production and maintenance employees employed by the Respondent at its Tecumseh facility; but excluding office clerical employees, group leaders, temporary workers, guards and supervisors as defined in the National Labor Relations Act, and all other employees.

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[1] We amend the caption to correct the spelling of Lenawee.

[2] We agree with the judge that the Respondent did not have a "sound arguable basis" for making a midterm contract modification by granting raises to unit employees without the Union's consent, and that under this standard the Respondent violated Sec. 8(a)(5) and (d) of the Act when it changed contractual wage rates. See *Bath Iron Works Corp.*, 345 NLRB 499, 501–502 (2005), affd. sub nom. *Bath Marine Draftsmen Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007).

Chairman Miscimarra finds that the "sound arguable basis" standard, rather than the "clear and unmistakable" waiver standard, is the correct standard to apply in midterm contract modification cases. Accordingly, he does not rely on the judge's "clear and unmistakable" waiver discussion regarding the Respondent's management-rights clause.

Member Pearce does not agree with the "sound arguable basis" standard articulated in *Bath Iron Works Corp.*, supra, but agrees that under this standard the Respondent violated Sec. 8(a)(5) and (d) of the Act when it modified the collective-bargaining agreement's wage provision by granting wage increases to unit employees without the Union's consent.

Member McFerran expresses no opinion whether *Bath Iron Works* was correctly decided, but she agrees that the Respondent's wage increases violated the Act under the "sound arguable basis" standard insofar as it applies. To the extent the Respondent argues that the management-rights clause permitted the wage increases at issue here, Member McFerran believes that only the heightened "clear and unmistakable" waiver standard applies, and she would find that the wage increases violated the Act under this standard as well.

The Respondent's sole argument in excepting to the judge's finding that the Respondent violated the Act by unilaterally implementing referral and sign-on bonuses is that the bonuses do not constitute wages and, therefore, are not mandatory subjects of bargaining. We reject this argument for the reasons stated by the judge.

Chairman Miscimarra notes that the types of unilateral changes implemented by the Respondent closely resemble the unlawful unilateral employer changes implemented in the Supreme Court decision *NLRB v. Katz*, 369 U.S. 736 (1962), which established that unilateral changes in mandatory bargaining subjects constitute violations of Sec. 8(a)(5) of Act. *Katz* dealt with unilateral wage increases, merit increases, and/or bonuses—the same types of unilateral changes the Respondent made here. Id. at 744–746.

[3] We have modified the judge's recommended Order to conform to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified.

Within 14 days after service by the Region, post at its facility in Tecumseh, Michigan, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 30, 2015.

Within 21 days after service by the Region, file with the Regional Director for Region 7 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 14, 2017

Philip A. Miscimarra, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail to continue in effect the terms and conditions of our 2013–2018 collective-bargaining agreement with Local 3000, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO (the Union) by granting wage increases to skilled and semiskilled unit employees without the Union's consent.

WE WILL NOT unilaterally change terms and conditions of employment of our unit employees by granting referral and sign-on bonuses to unit employees without giving notice and an opportunity to bargain to the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, upon request of the Union, rescind the wage increases given to skilled unit employees on November 30, 2015, and to semiskilled unit employees on March 22 and April 24, 2016.

WE WILL continue in effect all the terms and conditions of employment contained in our 2013–2018 collective-bargaining agreement with the Union.

WE WILL, upon request of the Union, rescind the referral and sign-on bonuses granted to unit employees beginning on March 22, 2016.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All regular full-time production and maintenance employees employed by us at our Tecumseh facility; but excluding office clerical employees, group leaders, temporary workers, guards and supervisors as defined

in the National Labor Relations Act, and all other employees.

LENAWEE STAMPING CORPORATION
D/B/A KIRCHHOFF VAN-ROB

The Board's decision can be found at www.nlrb.gov/case/07-CA-168498 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Rana Roumayah, Esq., for the General Counsel.
Michael Parente and *Todd Dawson, Esqs.,* for the Respondent.

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. This case was tried in Detroit, Michigan, on September 26, 2016. Local 3000, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO (the Union), filed the charge in Case 07–CA–168498 on January 25, 2016, and the charge in Case 07–CA–172535 on March 23, 2016, and the General Counsel issued an order consolidating cases, consolidated complaint and notice of hearing (the complaint) on June 30, 2016.

The complaint alleges that the Respondent, about November 30, 2015, unilaterally granted wage increases to skilled employees in the bargaining unit and, about March 28, 2016, unilaterally granted wage increases to semiskilled employees in the bargaining unit, without the Union's consent, in violation of Section 8(a)(5) and (1) and Section 8(d) of the Act.

The complaint also alleges that since about March 28, 2016, the Respondent has been unilaterally awarding sign-on bonuses and new hire referral bonuses to eligible bargaining unit employees in violation of Section 8(a)(5) and (1) of the Act.

On the entire record, including my observation of the demeanor of the witnesses,[1] and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, with an office and place of business in Tecumseh, Michigan, is engaged in the stamping, assembly, and non-retail sale of automotive support systems. In conducting its operations during the 12-month period ending December 31, 2015, the Respondent sold and shipped from its Tecumseh, Michigan facility goods valued in excess of $50,000 directly to points outside the State of Michigan. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Background

The Respondent is an automotive stamping and welding facility which supplies parts to manufacturers such as General Motors, Chrysler, Ford, Toyota, and BMW. The Respondent and the Union have had a collective-bargaining relationship since 1993. The most recent contract between the parties covers the period from April 5, 2013, until April 5, 2018 (GC Exh. 2). The bargaining unit represented by the Union is comprised of:

> All regular full-time production and maintenance employees employed by the Respondent at its Tecumseh, Michigan facility; but excluding office clerical employees, group leaders, temporary workers, guards and supervisors as defined in the National Labor Relations Act, and all other employees.

The bargaining unit is composed of skilled trade employees (skilled employees) and semiskilled trade employees (semiskilled employees). According to the credited testimony of Joseph Grisham, the unit chairperson of Local 3000 UAW (the Local Union), at the time of the hearing on September 26, 2016, there were approximately 610 employees in the bargaining unit represented by the Union. At that time, the bargaining unit contained 50 to 55 skilled trade employees who are composed of die repairman and maintenance employees. There were approximately 550 employees in the semiskilled employee classification, who are responsible for the actual production work at the plant. In November 2015, the total number of bargaining unit employees was approximately 425. According to the terms of the current collective-bargaining agreement, the starting wage rate for skilled employees is $22.19 per hour. According to Grisham, after 3 months skilled employees progressed to a wage level of $24.10 an hour. Pursuant to the col-

[1] In making my findings regarding the credibility of witnesses, I have considered their demeanor, the content of the testimony, and the inherent probabilities based on the record as a whole. In certain instances, I credited some, but not all, of what a witness said. I note, in this regard, that "nothing is more common in all kinds of judicial decisions to believe some and not all" of the testimony of a witness. *Jerry Ryce Builders*, 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.,* 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds, 340 U.S. 474 (1951). See also *J. Shaw Associates, LLC*, 349 NLRB 939, 939–940 (2007). In addition, I have carefully considered all the testimony in contradiction to my factual findings and have discredited such testimony.

lective-bargaining agreement, the starting wage rate for semiskilled employees is $10 an hour. The contract further provides that semiskilled employees have the following wage progression: 12 months-$10.40; 24 months-$10.90; 36 months-$12; and 48 months-$14.35 (GC Exh. 2, appendix A, p. 68).

The Wage Increase for Skilled Employees

According to the credited and uncontradicted testimony of Melissa Tarsha, the Respondent's human resources manager, the Respondent's facility operates approximately 300 dies, which are used to make various automotive parts. Die repairmen have a critical role in the Respondent's operation as they maintain the existing dies and also tests new dies that come into the plant. The Respondent attempts to comply with the industry standard of having a die repairman for every 10 dies, so that it needs to have approximately 30 die repairmen in order to operate at maximum efficiency. Tarsha testified that from the latter part of 2014 into 2015 the Respondent experienced a rapid decline of the die repairmen that it employed because they voluntarily left employment with the Respondent. The Respondent reached its lowest point in July 2015 when only five die repairman were employed.

According to Tarsha, the effect of the shortage of die repairman caused the remaining die repairmen to have to work excessive overtime. In addition, the Respondent was not able to maintain appropriate support for production or engage in preventative maintenance. Because of the inability to maintain production levels, the Respondent had to outsource approximately $1.2 to $1.3 million of work a month. In an attempt to alleviate situation, the Respondent also hired contract die makers at a cost of approximately $40-$50 an hour per individual. Because of the production problems that the Respondent experienced, the Respondent's customers became concerned that the Respondent would not be able to meet their requirements and became more involved in the Respondent's business operations. One customer had a representative in the plant to monitor the Respondent's production process regarding the parts supplied to it. Other customers required daily or weekly calls from Tarsha reporting on the manpower situation and what the Respondent was doing to alleviate it.

During 2015, the Respondent contacted multiple recruiters to assist it in hiring die repairmen. The Respondent received reports from its recruiters reporting that the primary factors hindering its recruitment of new die repairmen was that the Respondent's wages were below the market level and that the market for die repairmen was especially tight.

In late November 2015, Grisham and Steve Gonzalez, the local union president, met with John Donahoe, the Respondent's plant manager, in Donohue's office. According to Grisham, Donahoe informed the union representatives that the Respondent intended to increase the starting wage rate for skilled employees to $30 an hour. The union representatives informed Donahoe that the Respondent could not increase the wages to $30 an hour without bargaining with the Union. Donahoe presented no documentation to the Union at the meeting regarding the factors supporting the Respondent's intention to raise the starting wage rate for skilled employees and the union representatives did not consent to the increase.[2]

According to the uncontradicted testimony of Grisham, on November 30, 2015, the Respondent increased the wage rate of the approximately 25 skilled employees who were currently working for the Respondent to $30 an hour.

On November 30, 2015, Mike Thornton, a representative of UAW Region IA (the International Union), sent an email to Tarsha indicating that he had received a phone call from Ed Ward, the local union's acting local chairman, informing him that the Respondent had decided to increase the base wage rate of all skilled employees to $30 an hour. Thornton's email further indicated, inter alia, that if this information was accurate, he was putting the Respondent on notice that its action was a violation of the collective-bargaining agreement.

After the change in wages for the skilled employees had been implemented, the Union and the Respondent had a series of meetings in December 2015 and January 2016 regarding, inter alia, the wage increase that had been granted to the skilled employees. The first meeting occurred on December 2, 2015.[3] Grisham and Gonzalez attended on behalf of the Union, while Donahoe and Tarsha represented the Respondent. At this meeting Donahoe reiterated that the Respondent had to pay $30 an hour in order to attract more skilled employees into the plant. The parties did not reach an agreement regarding the wage increase for skilled employees at this meeting.

While there is not much detail regarding these meetings in the record, Grisham's credited testimony establishes that the Union was attempting to gain an increase in compensation for other members of the bargaining unit, who had not been subject to the increase in wages instituted by the Respondent for the skilled employees. At the meeting held on December 2, 2015, the Respondent made a proposal to the Union regarding proposed changes to the existing collective-bargaining agreement, including article 17, the provision regarding skilled trades employees. On December 10, 2015, the Union presented a counterproposal to the Respondent regarding its requested changes to the existing collective-bargaining agreement. On December 17, the parties met again and the Respondent made a new proposal seeking to modify the existing collective-bargaining agreement (GC Exh. 13). There was no agreement reached at

[2] Donahoe did not testify at the hearing and thus Grisham's testimony regarding this meeting is uncontradicted and I credit it. While Grisham's testimony about the meeting was brief, it was clear and concise with respect to its substance. Tarsha was not present for this meeting. Tarsha testified in a general fashion that the Respondent met with the Union before increasing the wages of skilled employees. According to Tarsha, the Union did not support the Respondent's position in raising the wages for skilled trade employees and did not offer any alternate solutions.

[3] There are minor discrepancies regarding the dates that the meetings were held by the parties in December 2015 and January 2016 between Grisham's testimony and a letter the Union sent to employees on January 11, 2016 (GC Exh. 6), advising them of the status of discussions that were being held between the Respondent and the Union. I have used the dates set forth in the letter to employees regarding these meetings as it was signed by Grisham and other members of the bargaining committee and was prepared shortly after the meetings were held. Under these circumstances I believe the Union's January 11 letter more accurately sets forth the dates of these meetings.

this meeting regarding modifications to the collective-bargaining agreement. The parties also met on January 6, 2016, but reached no agreement to modify the collective-bargaining agreement.

On January 6, 2016, the Respondent issued a memo to all employees (GC Exh. 5) indicating:

> The Union and Company have agreed to sit down to discuss wages and areas of improvements under the current Collective Bargaining Agreement. Changes to semi-skilled wages, including those of temporary employees, are not finalized. Further communications will be provided as we continue to have a dialogue. Thank you for your time and patience.

As noted above, on January 11, 2016, the Union sent a letter to all unit employees regarding the discussions between the parties that had taken place since the Respondent had unilaterally increased the wage rate of skilled employees at the end of November 2015. In this letter, Union indicated that the discussions had been generated because of the increase in wages to skilled employees implemented by the Respondent. The Union's letter also indicated it was not opposed to giving the skilled employees a wage increase, but that its position was that all bargaining unit employees should be compensated "for their hard work and efforts." (GC Exh. 6.)

On January 12, 2016, Grisham sent an email to Donahoe requesting that the Respondent indicate in writing that it had increased the wages of skilled trade employees by $5.90 an hour, as the Union had not received official notice of this wage adjustment (GC Exh. 7). On January 15, 2016, Tarsha replied in an email indicating "Skilled Trades employees are compensated at $30 an hour." (GC Exh. 8.)

The parties met again on January 14, 19, 25, and in early February 2016, to discuss possible modifications to the contract but did not reach an agreement.

According to Tarsha, as a result of the wage increase to skilled trade employees, at the time of the hearing on September 26, 2016, the Respondent had 15 die repairmen and had been able to bring back into the facility approximately 55 percent of the work it had previously outsourced. In addition, overtime had been reduced and the Respondent's customers no longer required daily or weekly updates regarding the Respondent's manpower situation.

The Wage Increase for Semiskilled Employees and the Implementation of Sign-On and New-Hire Referral Bonuses

Tarsha testified that during the latter part of 2015 and the first part of 2016, the Respondent also had difficulty in maintaining the requisite number of semiskilled employees. According to Tarsha the Respondent needs 712 semiskilled employees to effectively operate the facility.[4] Tarsha testified that during the early part of 2016 the number of semiskilled employees at the facility substantially declined. The Respondent received feedback from departing employees, a staffing agency that supplies it temporary employees, and "Michigan works!" a state job program, indicating that the reason for the decline was that the Respondent's wage scale was not competitive in the area. The information that the Respondent received reflected that the starting wage rate for other manufacturing facilities in the area ranged from $11.25 to $12 an hour. As noted above, the Respondent's starting wage rate for semiskilled employees was $10 an hour. In early 2016, the Respondent reached the level where it was approximately 100 employees short of its optimal level of employment of semiskilled trade employee. According to Tarsha, the result of the staffing shortage was excessive overtime, increased absenteeism, and the loss of customer confidence because of production problems.

As discussed above, from early December 2015 through February 2016, the parties had meetings regarding the possibility of reaching modifications to the existing contract, including the wages of skilled employees and semiskilled employees, but were unable to reach an agreement.

The Respondent periodically conducts "state of the business" meetings with employees to inform them of important issues. According to Grisham's credited and uncontradicted testimony, he attended a "state of the business meeting" conducted by Donahoe on March 22, 2016. At this meeting, Donahoe told the assembled unit employees that the Respondent was going to increase the wage rate for newly hired semiskilled employees from $10 to $10.75 an hour. Donahoe also told employees that if any current employee referred a new hire to work at the plant, the current employee would receive a $100 referral bonus. Finally, Donahoe stated that any new employee who completed the probationary period would receive a $1000 sign-on bonus.

Grisham testified that the Union had not consented to the $10.75 per hour wage rate for newly hired semiskilled trade employees. Grisham further testified the Respondent had never discussed the $100 referral bonus nor the $1000 sign-on bonus with the Union prior to the meeting that Donahoe conducted with unit employees on March 22. Grisham learned of these changes in compensation at the same time as the rest of the bargaining unit. On March 22, the Respondent also posted flyers in the facility regarding the referral bonus and the sign-on bonus (GC Exhs. 9 and 10). The new wage rate for semiskilled employees and the implementation of the referral and sign-on bonuses became effective on March 22.

Grisham testified that shortly after the meeting Donahoe conducted on March 22, some employees told him of their discontent with the Respondent's action as it applied to them. Grisham explained at the hearing that if current employees had not yet reached the $10.75 an hour level as of March 22, 2016, their pay was increased. However, employees who were making $10.75 an hour or above, received no increase. Under the contract wage scale, semiskilled trade employees who had worked for the Respondent for 2 years at the time this announcement were making $10.90 an hour. Grisham testified that there were approximately 200 employees who received no wage increase pursuant to the Respondent's change in the wage scale.

Later in the day on March 22, Grisham met with Donahoe and told him that the Respondent's action in increasing the

[4] According to Tarsha, this figure is composed of production employees, "hi-lo-drivers," quality employees, and team leaders. It also includes both temporary and full-time employees. Thus, it appears that this figure includes supervisors and temporary employees who are not included in the bargaining unit.

starting wage rate to $10.75 an hour was creating some discontent with respect to the manner in which it applied to current employees. Grisham also told Donahoe that he could not increase the wage rate by 75 cents an hour without bargaining with the Union. Donahoe merely responded by saying he had to increase the wages in order to attract new employees. Later in the day on March 22, Grisham called Donahoe and told him that employees who were currently in their probationary period were frustrated that they were not eligible for the $1000 sign-on bonus. Donahoe called Grisham back later that day and informed him that the Respondent would agree to pay the currently employed probationary employees the $1000 sign-on bonus, upon successful completion of their probationary period.

The parties met again on April 8, 2016, in an attempt to reach an agreement regarding modifications to the contract, including the starting wage rate for newly hired employees, but were unable to reach an agreement.

Grisham testified that when he returned from vacation on April 24 or 25, 2016, he listened to a voicemail message left on his phone by Donahoe on April 21. According to Donahoe's message, effective on April 24, 2016, the Respondent was going to raise the starting wage rate for semiskilled employees from $10.75 an hour to $11.50 an hour in order to attract new hires. Grisham credibly testified that the Respondent had not bargained with the Union regarding this change, and the Union had not consented to it. After listening to Donahoe's voicemail message, Grisham later saw Donahoe in the plant and Donahoe made a gesture crossing his fists. Grisham testified that he took this to mean that Donahoe was indicating that his hands were tied with regard to this issue.

On May 2, 2016, Grisham sent an email to Tarsha, reiterating a request originally made on April 12, 2016, asking that the Respondent provide something in writing pertaining to the entry level wage rate for semiskilled employees, the $1000 sign-on bonus and the $100 referral bonus. On May 10, Tarsha replied in an email indicating that the entry-level wage rate was $11.50 for semiskilled employees and that the sign-on and referral bonuses that Grisham's email had referred to were current and accurate. (GC Exh. 11.)

Tarsha credibly testified that as a result of the wage increase to semiskilled employees, overtime, absenteeism and employee turnover had decreased. In addition, she also testified that the Respondent had brought back into the facility at approximately 55 percent of the work that had been outsourced, and that customers no longer required daily or weekly updates. Finally, the Respondent was no longer expediting shipments on a regular basis.

Analysis

Whether the Wage Increase Granted to Skilled and Semiskilled Employees Violated Section 8(a)(5) and (1) and Section 8(d) of the Act.

As noted above, the Union and the Respondent are currently signatory to a collective-bargaining agreement effective from April 5, 2013, until April 5, 2018, covering the production and maintenance employees employed by the Respondent at its Tecumseh, Michigan facility. Pursuant to appendix A of this agreement, there are specific starting wage rates and wage progression levels for both skilled employees and semiskilled employees. On November 30, 2015, the Respondent unilaterally increased the wage rate for all skilled employees to $30 an hour. Prior to that point, the starting wage rate had been $22.19 per hour for newly hired skilled employees. After 3 months skilled employees received a raise to $24.10 an hour. On March 22, 2016, the Respondent unilaterally increased the starting wage rate for semiskilled employees to $10.75 an hour. The Respondent also unilaterally increased the wage rate of current employees who were earning less than $10.75 an hour to that amount. However, semiskilled employees who were being paid more than that did not receive a wage increase. On April 24, 2016, the Respondent again unilaterally increased the wage rate for semiskilled employees to $11.50 an hour. There is no record evidence regarding the effect this wage increase had on current employees earning less than the amount. Given the fact that when the Respondent's unilaterally increased the starting wage rate for semiskilled employees to $10.75 an hour in March, it also increased to that level the wages of all current employees who were earning less than that amount, I draw the inference that the Respondent took the same approach when it unilaterally raised the starting wage to $11.50 in April. I also draw the inference that semiskilled employees earning more than $11.50 an hour were not given a wage increase

Under the express terms of Section 8(d) of the Act, wages are a mandatory subject of bargaining. In *NLRB v. Katz*, 369 U.S. 736, 743–745 (1962), the Supreme Court held that an employer's unilateral implementation of a wage increase violates Section 8(a)(5) and (1) of the Act. *In Oak Cliff Golman Baking Co.*, 207 NLRB 1063, 1064 (1973), the Board held that the unambiguous language of Section 8(d) forbids an employer from making a midterm modification of a contract's wage provisions without the union's consent and noted that the union has the privilege of refusing to grant consent. The Board found that the respondent's conduct in unilaterally reducing wages during the term of its contract with the union, modified its collective-bargaining agreement within the meaning of Section 8 (d) of the Act, and thereby violated Section 8(a)(5) and (1).

Since *Oak Cliff Golman Baking Co*., supra, the Board has consistently held that an employer violates Section 8(a)(5) and (1) and Section 8(d) of the Act during the term of a collective-bargaining agreement by modifying any provision governing a mandatory subject of bargaining, such as wages, without obtaining the union's consent. *Daycon Products Co., Inc*., 357 NLRB 508 (2011), reaffirmed 360 NLRB No. 54 (2014); *Republic Die & Tool Co*., 343 NLRB 683, 686 (2004); *St. Barnabas Medical Center*, 341 NLRB 1325 (2004); *Integrated Health Services,* 336 NLRB 575, 579 (2001); *Wightman Center*, 301 NLRB 573, 575-576 (1991) *Mack Trucks, Inc*., 294 NLRB 864 (1989). In several of the cases cited above, the employer unilaterally increased the wages of employees during the term of a collective-bargaining agreement, the same action as that taken by the Respondent in the instant case. *St. Barnabas Medical Center; Integrated Health Services; Wightman Center; Mack Trucks Inc.* supra.

In *St. Barnabas Medical Center*, supra at 1329, the Board reiterated the following applicable principle that was expressed in *Integrated Health Services*, supra, at 579:

> The good intentions of the Respondent to stay in business and to deliver quality patient care are, however, irrelevant to the issue of whether the Respondent violated the Act when it unilaterally granted the wage increases during the term of the collective-bargaining agreements. The unambiguous language of Section 8(d) explicitly forbids midterm modification of a collective-bargaining agreement's wage provisions without the Union's consent

In the instant case, the Respondent contends that the shortage of skilled die repairmen and semiskilled production employees caused serious issues including the performance of an unsustainable amount of overtime work, substantial outsourcing costs, and the inability to perform preventive maintenance. The cumulative effect of this series of problems led to customer dissatisfaction. Respondent contends that the issues caused by the shortage of employees threatened its continued existence. The Respondent asserts that increasing the wages of skilled employees and semiskilled production employees was necessary to maintain the effective and efficient operation of its facility.

Respondent contends that the midterm modifications it made to the wages of skilled and semiskilled employees is permitted under its interpretation of the collective-bargaining agreement. In this connection, the Respondent argues that the wage rates set forth in the collective-bargaining agreement set forth the minimum amount that the Respondent is required to pay, but that there is nothing to prohibit the Respondent from paying a higher wage rate. In addition, the Respondent contends that its action in raising the wage rates of skilled and semiskilled trade employees is permitted under the management-rights clause of the existing collective-bargaining agreement which provides , inter alia, that the Respondent has the right to "make, enforce and amend or revise such work rules and regulations as it may from time to time, in its sole discretion, deems suitable for the purpose of maintaining the order, safety and/or effective and efficient operation of Company facilities." (GC Exh. 2, art. 4, sec. 2, p. 6.)

In support of its position, the Respondent relies on cases in which the Board has refused to find a violation of Section 8(a)(5) and (1) and Section 8(d) on the basis that an employer's midterm modification of an agreement had a "sound, arguable basis" in the contract. *American Electric Power*, 362 NLRB No. 92 (2015); *Bath Iron Works Corp.*, 345 NLRB 499, 501–502 (2005), affd. sub nom. *Bath Marine Draftsmen Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007); *Phelps Dodge Magnet Wire Corp.*, 346 NLRB 949 (2006); *Thermo Electron Corp.*, 287 NLRB 820 (1987); *NCR Corp.*, 271 NLRB 1212, 1213 (1984).

In the instant case, the current collective-bargaining agreement provides, in appendix A, a "Wage Progression Schedule (2013–2018)" that states: "The Company shall follow the following wage scales during the term of the agreement:" The agreement then provides, for both skilled and semiskilled employees, specific starting rates and wage progression scales throughout the term of the collective-bargaining agreement. There is absolutely no language in the collective-bargaining agreement that provides that the Respondent has discretion with respect to paying wages above those set forth in the collective-bargaining agreement. For example, there is nothing in the agreement that indicates that the Respondent can pay wages within a certain range. There is certainly nothing to support the Respondent's position that the collective-bargaining agreement sets minimum wage rates and that the Respondent has the unfettered discretion to pay more than that. In this regard, I find that the Respondent's right to make or revise "work rules and regulations" does not apply to the specific wage rates set forth in appendix A of the parties collective-bargaining agreement. Thus I find that the employer's interpretation of the agreement does not have a "sound, arguable basis"; rather, I find it to be implausible.

None of the cases relied on by the Respondent involve a conflict between the General Counsel and a respondent regarding the interpretation of express wage rates set forth in a collective-bargaining agreement. While the cases relied on by the Respondent involve the consideration of differing contract interpretations regarding a variety of other mandatory subjects of bargaining, in each one, the Board found that there was a plausible contract interpretation to support the respondent's position. In such situations, the Board holds that, when the dispute is solely one of contract interpretation and there is no evidence of, animus, bad faith or an intent to undermine the union, "the Board does not seek to determine which of two equally plausible contract interpretations is correct." *American Electric Power*, supra, slip op. at 3; *Phelps Dodge Magnet Wire Corp.*, supra, at 951. It is on that basis that the Board refuses to find a violation of Section 8(a)(5) and (1) and Section 8(d) of the Act in such situations.

In the instant case, since there is no language in the current collective-bargaining agreement between the parties that supports the Respondent's interpretation of the agreement, I find the cases relied on by the Respondent to be distinguishable. Rather, I find the instant case to be similar to *Hospital San Carlos Borromeo*, 355 NLRB 153 (2010). In that case, the Board found that the respondent did not have a sound, arguable basis for its contract interpretation. Rather, the Board found that the respondent's interpretation was implausible. Accordingly, the Board found that the respondent's refusal to pay employees the full amount of the Christmas bonus owed to them under the parties' collective-bargaining agreements violated Section 8(a)(5) and (1) of the Act.

As noted above, the Respondent also contends that the management-rights clause of the collective-bargaining agreement supports its position that it is permitted to make midterm wage increases in order to maintain effective and efficient facility operations (GC Exh. 2, art. 4, sec. 2). However, the management-rights clause specifically indicates that the Respondent "has all rights, powers, prerogatives, authority and functions except as those rights, powers prerogatives, authority and functions are expressly and specifically restricted by the written provisions of this Agreement." (GC Exh. 2, art. 4, sec. 3.) As noted above, Appendix A of the collective-bargaining agreement clearly sets forth the wages to be paid during the term of the agreement.

In determining whether a management rights clause permits an employer to unilaterally change a mandatory subject of bargaining during the term of a collective-bargaining agreement,

the Board applies its long held "clear and unmistakable waiver" standard. This standard "requires bargaining partners to unequivocally and specifically express the mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007). It is, of course, the case that the union's actual consent is required before a mandatory subject of bargaining contained in a collective-bargaining agreement can be modified. Id. at fn. 16. It is the burden of the party asserting a waiver of bargaining rights to establish its existence. *Philadelphia Coca-Cola Bottling Co*., 340 NLRB 349, 353 (2003).

In the instant case, the general language that the Respondent relies on in the management-rights clause certainly does not establish that the parties have unequivocally and specifically expressed the mutual intention to permit unilateral employer action with respect to the wage rates specifically set forth in the collective-bargaining agreement.

I also note that there is no reopener provision in the collective-bargaining agreement between the parties regarding wages. Since there is no wage reopener provision, the fact that the parties met and discussed various proposals regarding modifications to the collective-bargaining agreement, including the wages of skilled and semiskilled employees, did not impose traditional bargaining obligations on the parties. *St Barnabas Medical Center*, supra, at 1325.The only manner in which the Respondent could have lawfully implemented the wage increases granted to skilled and semiskilled employees was to obtain the Union's consent. Since it did not do so, the Respondent's implementation of wage increases to the skilled employees on November 30, 2015, and the semiskilled employees on March 22 and April 24, 2016,[5] during the term of the collective-bargaining agreement, violated Section 8(a)(5) and (1) and Section 8(d) of the Act.

Whether the Respondent's Unilateral Grant of New Hire Referral and Sign-On Bonuses to Unit Employees violated Section 8(a)(5) and (1) of the Act

The first issue for resolution is whether the new hire referral and sign-on bonuses are mandatory subjects of bargaining. *In Ohio Edison Co.*, 362 NLRB No. 88, JD slip op. at 10 (2015), the Board reiterated some of the applicable principles with respect to this issue as follows:

> Section 8(d) of the Act requires that an employer bargain with a union representing its employees with respect to "wages, hours, and other terms and conditions of employment." It is clear that an employer has a duty to bargain with the union over mandatory subjects of bargaining and that its failure to do so violates Section 8(a)(5) and (1) of the Act. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 679-682 (1981); *NLRB v. Katz*, 369 U.S. 736, 743 (1962). In *Postal Service*, 302 NLRB 767, 776 (1991) the Board noted that it "has broadly construed the term 'wages' in Section 8(d) of the Act to include "emoluments of value. . . which may accrue to employees out of the employment relationship." *Central Illinois Public Service Co.*, 139 NLRB 1407 (1962). In other words the term "wages" does not refer to a sum of money given for actual hours worked; rather it also encompasses numerous other forms of compensation."

The Board has held that it finds payments to employees, including bonuses, to constitute wages and thus a mandatory subject of bargaining, when there are clear ties to employment-related factors. *North American Pipe Corp*., 347 NLRB 836, 837–838 (2006). In *Phelps Dodge Mining Co.*, 308 NLRB 985 (1992), enf. denied 922 F.3d 1493 (10th Cir. 1994), the Board found that "appreciation payments" in amounts of up to $1000 constituted significant employment benefits to eligible employees, based on the employment-related factors of wages and hours worked, and thus constituted a mandatory subject of bargaining over which the respondent was required to bargain.

In the instant case, the record clearly establishes that the Respondent had a substantial need to hire new skilled and semiskilled employees and to retain employees who were currently employed. In an effort to assist it in alleviating the manpower shortage the Respondent was experiencing, it offered a $100 referral bonus to existing unit employees if they referred an individual to the Respondent and the referred employee completed the probationary period. The payment of both the referral bonus and the sign-on bonus are clearly tied to the employment-related factor of hiring new employees who successfully complete the probationary period. In addition, the payment of the referral bonus, in effect, constitutes a wage increase for currently employed employees and the sign-on bonus, in effect, constitutes a substantial wage increase to newly hired employees who successfully complete the probationary period. It is clear that both the referral and sign-on bonuses constitute mandatory subjects of bargaining and thus the Respondent was obligated to give notice and an opportunity to bargain with the Union before implementing the bonuses.

On March 22, 2016, the Respondent announced to the employees assembled at a "state of the business" meeting that it was implementing the referral and sign-up bonuses. On the same date, the Respondent posted flyers in the facility advising employees of the implementation of these programs. The Union was not given prior notice or an opportunity to bargain over the bonus plans prior to their implementation. As noted above, Grisham found out about the implementation of these programs at the same time as unit employees by virtue of his attendance at the meeting held on March 22. After the meeting, several employees who were currently in their probationary periods spoke to Grisham and told him that they were frustrated by the

[5] Par. 14(b) of the complaint alleges that "about March 28, 2016" the Respondent unilaterally awarded a wage increase to semiskilled employees. In conjunction with paragraphs 15 and 16 of the complaint, the complaint alleges that the Respondent's conduct violated Sec. 8(a)(5) and (1) and Sec. 8 (d) of the Act. While the complaint does not specifically allege the wage increase that the Respondent granted to semiskilled employees on April 24, 2016, to be a violation of the Act, there is an extremely close connection between the specific allegation of the complaint and the Respondent's nearly identical unilateral conduct in April 2016. Accordingly, I find the Respondent's April 24, 2016 conduct is sufficiently related to the complaint allegation for me to consider it as an unfair labor practice. *Hi-Tech Cable Corp*., 318 NLRB 280 (1995), enfd. in part, 128 F.3d 271 (5th Cir. 1997).

fact that they were not eligible for the sign-on bonus, as it would be granted only to employees who started after March 22. Grisham called Donahoe later that day and informed him of the frustration of the current employees in the probationary period regarding the fact that they were not eligible for the $1000 sign-on bonus. The Respondent then agreed that it would pay currently employed probationary employees the $1000 sign-on bonus upon the successful completion of their probationary period.

It is clear that the Respondent did not provide the Union's with prior notice and an opportunity to bargain to regarding the referral and sign-on bonuses before they were implemented on March 22, 2016. Rather, the Union found out about the implementation of the bonuses at the same time as unit employees.

The standards utilized by the Board in determining whether a respondent has unlawfully failed to notify the union in advance of an implemented change in a mandatory subject of bargaining are set forth in *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013 (1982), enfd. 722 F.2d 1120, 1126–1127 (3d Cir. 1983). In that case the Board indicated:

> The Board has long recognized that, where a union received timely notice that the employer intends to change a condition of employment, it must properly request that the employer bargain over the matter. To be timely, the notice must be given sufficiently in advance of the actual implementation of the change to allow a reasonable opportunity to bargain. However, if the notice is too short a time before the implementation or because the employer has no intention of changing its mind, then the notice is nothing more than informing the union of a *fait accompli*. [Footnotes omitted.]

The Board has consistently applied these standards in determining whether a respondent's unilateral change in a mandatory subject of bargaining violates Section 8(a)(5) and (1) of the Act. *Ohio Edison Co*., supra, JD slip op. at 12; *Roll & Hold Warehouse & Distribution Corp*., 325 NLRB 41, 42 (1997); *Intersystems Design and Technology Corp*., 278 NLRB 759 (1986).

Applying those standards to the instant case, the Respondent did not give the Union prior notice or an opportunity to bargain before notifying unit employees of its newly implemented policy regarding referral and sign-on bonuses. Rather, the Union found out about these new policies at the same time as unit employees. Thus, the Union was presented with a fait accompli. The fact that the Respondent discussed with the Union the manner in which the sign-on bonus would be applied to employees currently in the probationary period, did not cure the Respondent's failure to give notice and an opportunity to bargain to the Union before the sign-on bonus was implemented. The Respondent was obligated to give the Union notice in advance of implementation in order to allow good-faith bargaining to occur. *Woodland Clinic*, 331 NLRB 735, 738 (2000).

I also note there is nothing in the parties' current collective-bargaining agreement that would privilege its unilateral implementation of the referral and sign-on bonuses. The only mention of a bonus in the collective-bargaining agreement is that it provides that all employees would receive a $1000 one-time signing bonus to be paid within 30 days of the ratification of the collective-bargaining agreement (GC Exh. 2, p. 88). There is nothing in the collective bargaining agreement that establishes that the Union waived its bargaining rights with respect to the implementation of a referral and sign-on bonus during the term of the collective bargaining agreement under the standards set forth above in *Provena St. Joseph Medical Center,* supra.

On the basis of the foregoing, I find that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally granting referral and sign-on bonuses to unit employees beginning on March 22, 2016.

CONCLUSIONS OF LAW

1. Local 3000, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO (the Union), is, and, at all material times, was the exclusive bargaining representative in the following appropriate unit:

> All regular full-time production and maintenance employees employed by the Respondent at its Tecumseh, Michigan facility; but excluding office clerical employees, group leaders, temporary workers, guards and supervisors as defined in the National Labor Relations Act, and all other employees.

2. The Respondent and the Union are parties to a collective-bargaining agreement that is effective by its terms from April 5, 2013, until April 5, 2018.

3. The Respondent engaged in unfair labor practices in violation of Section 8(a)(5) and (1) and Section 8(d) of the Act by, on November 30, 2015, unilaterally granting wage increases to skilled unit employees and by, on March 22 and April 24, 2016, unilaterally granting wage increases to semiskilled unit employees, without the consent of the Union.

4. The Respondent engaged in unfair labor practices in violation of Section 8(a)(5) and (1) by, beginning on March 22, 2016, unilaterally granting referral and sign-on bonuses to unit employees without giving the Union prior notice and an opportunity to bargain.

5. The above unfair labor practices affect commerce within the meaning of Section 2(2), (6,) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. I shall order the Respondent to rescind, upon the request of the Union, the wage increases granted to skilled and unskilled employees. *St. Barnabas Medical Center; Integrated Health Services; Wightman Center; Mack Trucks Inc.* supra. I shall also order the Respondent to rescind, upon the request of the Union, the referral and sign-on bonuses granted to unit employees and bargain with the Union if it desires to grant referral and sign-on bonuses to unit employees. *Washington Beef, Inc*., 328 NLRB 612, 613, 621 (1999).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Lewanee Stamping Corp. d/b/a Kirchhoff Van-Rob, Tecumseh, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local 3000, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO (the Union), in the following appropriate unit, by unilaterally implementing wage increases to unit employees during the term of a collective bargaining agreement, without the consent of the Union. The appropriate bargaining unit is:

> All regular full-time production and maintenance employees employed by the Respondent at its Tecumseh facility; but excluding office clerical employees, group leaders, temporary workers, guards and supervisors as defined in the National Labor Relations Act, and all other employees

(b) Refusing to bargain with the Union by unilaterally granting referral and sign-on bonuses to unit employees without giving notice and an opportunity to bargain to the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request of the Union, rescind the wage increases given to skilled unit employees on November 30, 2015, and to semiskilled unit employees on March 22 and April 24, 2016.

(b) On request of the Union, rescind the referral and sign-on bonuses granted to unit employees beginning on March 22, 2016, and give notice and an opportunity to bargain to the Union regarding granting such bonuses to unit employees.

(c) Within 14 days after service by the Region, post at its facility in Tecumseh, Michigan, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 30, 2015.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 22, 2016.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with Local 3000, International Union United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO (the Union), in the following appropriate unit, by unilaterally implementing wage increases during the term of a collective bargaining agreement, without the consent of the Union. The appropriate bargaining unit is:

> All regular full-time production and maintenance employees employed by the Respondent at its Tecumseh, Michigan facility; but excluding office clerical employees, group leaders, temporary workers, guards and supervisors as defined in the National Labor Relations Act, and all other employees.

WE WILL NOT refuse to bargain with the Union by unilaterally granting referral and sign-on bonuses to unit employees without giving notice and an opportunity to bargain to the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request of the Union, rescind the wage increas-

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

es given to skilled unit employees on November 30, 2015, and to semiskilled unit employees on March 22 and April 24, 2016.

WE WILL, on request of the Union, rescind the referral and sign-on bonuses granted to unit employees on or after March 22, 2016, and give notice and an opportunity to bargain to the Union regarding granting such bonuses to unit employees.

LENAWEE STAMPING CORPORATION D/B/A KIRCHHOFF VAN-ROB

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/07-CA-168498 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.